Supreme Court, U. S.
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NO. 79-1737

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

TIM Z. OGLE,	)	
	)	
Petitioner,	)	On Petition for a
	)	Writ of Certiorari
v.	)	to the United States
	)	Court of Appeals
UNITED STATES OF AMERICA,	)	for the Tenth Circuit
	)	
Respondent.	)	

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I
INTRODUCTORY STATEMENT

This Reply Memorandum is submitted primarily to correct two serious misstatements in the Governments Brief in Opposition and to cite to the Court a new decision on the issue of effective assistance of counsel pertaining to the failure to request an appropriate instruction on a critical issue. Limitation of this Memorandum to these three matters does not indicate any abandonment of the other reasons why the writ should be granted, but is merely an indication that, as to such other reasons, the Petition for the Grant of a Writ, needs no further clarification or additional argument.

The two matters which, unfortunately, do require further discussion are:

1. The assertion by the Government that any error in the definition of corruptly cannot be prejudicial to Mr. Ogle because his defense at trial was that he had not endeavored or caused anyone to endeavor to influence the juror involved.

2. The obfuscation of the purport of the instructions under 18 USC 1503 given by the trial court and approved by the United States Court of Appeals for the Tenth Circuit, and of the fact that such approval creates a serious conflict between the Circuits which require resolution by this Court.

These will be dealt with in that order. After these two matters the new decision will be cited and discussed briefly.

II

MR. OGLE MAINTAINED TWO DEFENSES AT HIS TRIAL, AS HE WAS ENTITLED TO DO. THE FIRST WAS FACTUAL AND THE SECOND LEGAL.

The Government argues that:

> "Moreover, petitioner's defense at trial was not that he had endeavored to influence Mrs. Hansen for some innocent or benevolent purpose, but rather that he had not endeavored or caused anyone to endeavor to influence her at all." (Brief in Opposition, p. 5, ft. 4).

This statement, even if it were true, and it is not, is a weak reed in a brief in opposition to certiorari. If it were true, it would be proper to argue on the merits to show that even if an error had been made, it was harmless. It would have been proper, indeed, if the Court of Appeals had relied thereon, but the Tenth Circuit did not. While that Circuit seriously misstated Mr. Ogle's legal argument, it did recognize that he had raised a legal defense in addition to his factual one (Pet. App., p. 66-67).

There would be no conflict between the Circuits, if the Tenth Circuit had said that Mr. Ogle's requested definition of "corruptly" should have been given but that the error was harmless because his sole defense was that he had not made any such endeavor. Indeed this was urged by the United States Attorney in his brief to the Court of Appeals, but that Court, to its credit, rejected the invitation and met the second issue. In so doing, unfortunately, it created the serious conflict between the Circuits on the meaning of "corruptly" as that word is used in 1503.

While it is true that Mr. Ogle's primary defense was that he had not made the requisite endeavor to be convicted under 1503, his second line of defense was that even if the jury choose to believe differently, his motives were not corrupt.

Even if it be assumed that such defenses were inconsistent, the law is clear that "Alternative defenses, of course, are proper, even if inconsistent." (*United States v. King,* 587 F.2d 956, 965 (9th Cir. 1978); *United States v. Demma,* 523 F.2d 981, 985, and cases cited at ft. 6 (9th Cir. 1975) (en banc); *Whitaker v. United States,* 281 F.2d 631, 632 (DC Cir. 1960).

Mr. Ogle's counsel at the trial in his motion for a directed verdict stated his additional defense which pertained to the nature of the Handbook and its contents (Vol. III, pp. 237-238). The Trial Court in denying the motion stated:

> "A fair reading of that handbook shows that it in itself is an effort to impede and obstruct justice." (Vol. III, p. 243.)

After this ruling, it was clear to Mr. Ogle that he not only had to defend on the physical facts, but that his beliefs and the purity of his motives were also critical issues. He tried, under the severe limitations imposed upon him by the Trial Court, to make this clear to the jury, *i.e.,* that even if he had tried to have the Handbook delivered to Mrs. Hansen, which he denied, the action was not done "corruptly" since he had no evil motive. (See *e.g.,* Vol. III, pp. 263-269; see also discussion in Chambers, Vol. III, p. 322). The Trial Court recognized, albeit belatedly, that at least some of these matters were in issue since it did give instruction which allowed the jury to determine if the Handbook would influence a juror or would impede or obstruct the due administration of justice before they might find Mr. Ogle guilty for endeavoring to distribute the same to a sitting juror. (Vol. V, p. 26.) Unfortunately before this change of position the trial court made its evidentiary rulings against Mr. Ogle based upon the position quoted above.

Additionally, Mr. Ogle put the matter of improper motive in issue by denying that he had a personal interest, other than humanitarian, in the outcome of the Gigax case (Vol. III, p. 274, lines 10-25; p. 275, line 1). Nothing in the record contradicts his statement in that regard.

III

CONTRARY TO THE ASSERTION OF THE GOVERNMENT THE DECISION BELOW CREATES A SERIOUS CONFLICT BETWEEN THE CIRCUITS ON THE MEANING OF THE WORD "CORRUPTLY" IN 1503, AND ON THE INSTRUCTIONS WHICH MUST BE GIVEN TO A JURY THEREON.

If as the Tenth Circuit would have it, any endeavor, is *per se* corrupt, then the word "corruptly" is both unnecessary and meaningless in the statute. To take that position would be to assume that the Congress did not mean anything at all when it inserted that critical word. This Court does not take such a position in interpreting criminal statutes (e.g. *Jeffers v. United States,* 432 US 137, 148-149 (1977))

The Government has seriously misstated the import of the instructions given on the meaning of corruptly, endeavor and specific intent:

> The court explained to the jury that a finding of guilt must rest on a determination that petitioner acted "with the specific intent to do something that the law forbids, that is to say with a bad purpose either to disobey or to disregard the law" (V R. 7). The court several times reiterated that petitioner must have acted "corruptly" in order to be convicted (V R. 3, 5, 6) and explained that an "endeavor" undertaken "corruptly" was "any effort to attempt to accomplish the evil purpose that the statute was designed to protect * * *" (V R. 6). Finally, the court's repeated use of the phrases "influence and impede" and "influence, obstruct, or impede" (V R. 3, 5-7) also imparted to the jury the sense that a wrongful intention is required under the statute. (Brief in Opposition, p. 5).

The Government seeks to negate the serious impropriety of the definition of "corruptly" as "any endeavor to influence a juror in the performance of his or her duties or to influence, obstruct or impede the due administration of justice. . . ." (Brief in Opposition, p. 4) by its emphasis on the number of times the trial court used the word "corruptly" in the course of its instructions. The repetition of a word which has been incorrectly defined adds to, rather than detracts from, the harm caused by such erroneous definition.

The word "corruptly" when used in a statute which also requires specific intent must mean that motive as well as intent are each integral parts of the Government's burden of proof. (See cases cited in Petition, pages 16-18 and particularly *United States v. Lazzerini,* 611 F.2d 940, 942 (1st Cir. 1979) for its analysis of Section 1503 on this very point.) The "critical ingredient" is "corrupt motive."

The fact that the word "endeavor" was correctly defined does not change that result. Proof of the endeavor is essential to prove the specific intent and is not necessarily part of the motivation.

Even the trial court in this case recognized that the motivation of the accused and his intent were two separate factors. Just prior to the incorrect definition of corruptly, the jury was instructed that:

> "Then, third that the defendant's acts in causing the petit juror to be contacted were done corruptly *and also* with the specific intent to impede or influence a petit juror or to impede or obstruct the administration of justice." (emphasis supplied) (Transcript Vol. V, p. 6).

It is indeed, ironic, that after recognizing the separate qualities of motive and intent, the trial court eliminated the first by equating it to any endeavor. Thus the statute was changed to read, in effect: "Whoever endeavors . . ." The Congress could make that change, but not the Courts.

There are cases in which the nature and factual situations of the endeavor itself also sheds light on motivation.

The Government, in an effort to support this incorrect definition, cites two of them (Brief in Opposition, p. 5). In the first, the endeavor was the action of an employer to get one of his employees not to tell certain facts to a Grand Jury (*United States v. Johnson,* 585 F.2d 119, 123 (5th Cir. 1978).

The opinion itself does not quote the definition, if any, of the term "corruptly" as given the jury by the trial court. It must be remembered that this was 1978 Fifth Circuit decision, and one member of the panel, Judge Hill, also had been a member of the panel which decided the earlier 1978 5th Circuit decision in *United States v. Partin,* 552 F.2d 621, 642. The *Partin* decision endorsed as correct, the definition of "corruptly" as meaning that ". . . a defendant acted with improper motive or with bad or evil or wicked purpose," and the decision in *Johnson* did not distinguish *Partin,* but rather cited the same authority as used in *Partin* for this point, i.e. *United States v. Ryan,* 455 F.2d 728, 734 (9th Cir. 1971).

In the second, the endeavor was to talk to prospective veniremen about a forthcoming trial of a friend of Jackson and to tell them to listen for the word "harassment." (*United States v. Jackson,* 607 F.2d 1219, 1221 (8th Cir. 1979). In that case the Trial Court instruct, in pertinent part:

> "In this, the word 'corruptly' means willfully, knowingly, and with the specific intent to influence a juror to abrogate his or her legal duties as a petit juror." (Id.)

This is a far cry from an instruction which says that any endeavor to influence a juror is corrupt.

The Tenth Circuit put its *imprimatur* on the erroneous definition of "corruptly" with these words:

> It really means unlawful, and this is the way that Judge Arraj interpreted it and put it in terms of the facts of this case. In other words, he said that an endeavor to influence a juror in the performance of his or her duty or to influence, obstruct or impede the

due administration of justice is per se unlawful and is tantamount to doing the act corruptly. We approve fully the trial court's interpretation. (Pet. App. 66).

It is precisely this stamp of approval of the trial court's definition of "corruptly" which, contrary to the assertion of the Government (Brief in Opposition, p. 5) is in conflict with the decisions of other Circuits which have addressed the same issue.

Further the Government seeks to confuse the matter by stating:

> "However, no specific terminology is required provided that, as occurred here, the jury is properly advised of *the nature of the defendant's intent* required to convict." (emphasis supplied) (Brief in Opposition, p. 6).

The nature of the intent required was that it be specific. There is no argument about that. What is in issue here is the conflict between the circuits as to the *motive* or *purpose* required for a 1503 conviction. The Tenth Circuit says that "any endeavor . . . is *per se* unlawful and is tantamount to doing the act corruptly." The other circuits which have ruled on this matter have all equated the term corruptly with something much more than just the specific intent to influence a juror. The touchstone of the crime for them is the motivation of the defendant for such acts.

To be found guilty of a violation of 1503 one's motives must be found to be corrupt, i.e. with an evil purpose. Attempted unlawful communication to a juror without such evil motivation will at most support a conviction under 18 USC 1504.

IV

THE FAILURE TO REQUEST A PROPER INSTRUCTION ON PROOF OF SPECIFIC INTENT WAS, UNDER THE CIRCUMSTANCES OF THIS CASE, SUFFICIENT TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Where an issue is critical, and Mr. Ogle's intent was an essential element which the jury had to determine, it is defense counsel's duty to inform himself of the applicable law and to request an appropriate instruction on that point. This is especially true with matters pertaining to the burden of persuasion. A failure to do this cannot be considered to be a matter of trial tactics and is sufficient to establish ineffective assistance of counsel (*McNulty v. Olim,* 488 F Supp. 1384, 1388-1390 (D Hawaii, 1980).

While in *McNulty,* the Court found that no prejudice was shown, after making the finding of ineffective assistance of counsel, because of the strength of the evidence on the point in question, no similar finding could be made in this case. Evidence, if any, of the requisite specific intent by Mr. Ogle was slim and tenuous at best. It cannot be said with any degree of certainty that a correct instruction on proof of specific intent, which did not include the burden shifting "unless the contrary appears from evidence" phrase, might not have resulted in an acquittal.

The *McNulty* decision was not announced until May 9, 1980, and did not become known to counsel for Mr. Ogle until receipt of the Federal Supplement advance sheet, dated July 28, 1980, from West Publishing Co.

V
CONCLUSION

For these reasons, and those contained in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day 11th of August, 1980, three copies of the Petitioner's Reply Memorandum were mailed, postage prepaid, to: The Honorable Wade McCrea, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served, have been served.

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